Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART; JANET NAPOLITANO,
ATTORNEY GENERAL,
PETITIONERS,

-vs-

KEVIN DEE POLSTON,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

_x_FILED ___LODGED
___RECEIVED ___COPY
Jan 12 1999
Clerk U S District Court
District of Arizona
BY_____DEPUTY

KEVIN DEE POLSTON,

Petitioner,

vs.

TERRY L. STEWART,

Respondent.

JUDGMENT IN A CIVIL CASE

Case No. CV 97-019 T-JMR

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXX DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is DENIED.

IT IS FURTHER ORDERED, that this case is DISMISSED.

JANUARY 11, 1999
DATE

RICHARD H. WEARE
CLERK

S/ M. HARDEMAN
(By) Deputy Clerk/Marilyn Hardeman

COPIES TO: ROBERTS, YANKOWSKI, STEWART, Ord. Bk., JMR

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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Jan 12 1999
Clerk U S District Court
District of Arizona
BY_____DEPUTY

KEVIN DEE POLSTON,	)	
	)	
Petitioner,	)	
	)	No. CV 97-019 T-JMR
vs.	)	
	)	
TERRY L. STEWART,	)	ORDER
	)	
Respondent.	)	
	)	

Before the Court is Kevin Dee Polston's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated below, his request for relief is denied.

Background

Petitioner was indicted on August 10, 1990, on five counts of armed robbery, six counts of aggravated assault, six counts of burglary, and one count of attempted robbery. Thereafter, on August 16, 1990, Petitioner was indicted on another count of armed robbery. The cases were consolidated for trial.

Two weeks before trial Petitioner's defense counsel asked the trial court to order a complete Rule 11 competency evaluation.[1] On April 17, 1991, the trial court held a hearing to determine if there were reasonable grounds to hold a Rule 11 competency hearing. Petitioner's counsel informed the trial court that he had requested the competency hearing because of a deterioration in his client's rationality. Petitioner's trial counsel also informed the trial court that he had not had a chance to review the court clinic evaluation. The court relied on a psychiatric report prepared by Dr. Flynn. In his pre-Rule 11 hearing report, Dr. Flynn noted that Petitioner voiced "extreme religious beliefs which included the decision to give over to God total power of his life and power over all decisions that he might make" and that his religious beliefs lead to fasting. The trial judge denied the Rule 11 motion and refused to order a Rule 11 evaluation.

After trial the jury convicted Petitioner of all 19 counts. As the only witness for the defense at trial, Petitioner testified at trial and admitted his involvement in each of the offenses. Petitioner was sentenced to 28 years imprisonment.

Petitioner filed a petition for post-conviction relief on October 26, 1993. Petitioner alleged that he was incompetent during plea bargaining and at trial, and that his trial counsel was ineffective. The basis for the incompetency claim was that Petitioner refused a plea bargain that would have given him a more lenient sentence than that imposed after the trial. During plea negotiations, Petitioner informed counsel that he would look to God for guidance and that he did not believe God desired that he accept the plea bargain.

The ineffective assistance of counsel claim is based on the failure of Petitioner's trial counsel to renew his request for a competency hearing after reviewing Dr. Flynn's evaluation of Petitioner. Dr. Flynn

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1. Under Ariz.R.Crim.Pro. 11.2 the state court must hold a competency examination when there are "reasonable grounds" to question a defendant's competency.

believed that further evaluation may have been appropriate, but decided that Petitioner did not suffer from an emotional disorder.

In March 1994, the trial court held a two-part evidentiary hearing regarding the petition for post-conviction relief at which two of Petitioner's former attorneys and two expert witnesses testified. The trial court denied relief. The trial court also denied a motion for rehearing, but granted Petitioner's request for a delayed appeal.

Petitioner appealed and filed a petition for review.

Discussion

Defaulted Claims

A federal court cannot grant relief to a prisoner's section 2254 habeas petition unless the prisoner has exhausted all of his claims in state court. See Coleman v. Thompson, 501 U.S. 722, 731-32 (1989). This is referred to as the "exhaustion requirement." Id.

To exhaust state remedies, the petitioner must have afforded the state's highest court the opportunity to rule upon the merits of the federal constitutional claim by fairly presenting the claim to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346, 351 (1989). A claim is "fairly presented" if the petitioner has described the operative facts and legal theories on which the claim is based. See Picard v. Connor, 404 U.S. 270, 277-78 (1971). However, if a petitioner fails to alert the state court that he or she is raising a federal constitutional claim, the federal claim is unexhausted regardless of its similarity to the issues raised in state court. See Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996). As stated by the Supreme Court, "[i]f a habeas petitioner wishes to claim that . . . a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court but in state court." Duncan v. Henry, 513 U.S. 364, 365 (1995). Once the petitioner has afforded the state's highest court an opportunity to rule upon the merits of the alleged federal constitutional violation, the

petitioner has complied with the exhaustion doctrine and the federal district court may review the claim on the merits. See Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

If the petitioner has failed to fairly present a claim to the state's highest court in a procedurally appropriate manner, state court remedies may nonetheless be exhausted. First, a state court may have already found a petitioner's claims defaulted because he or she failed to follow proper state procedures in attempting to raise the claims in state court. See Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 2594 (1991); Coleman, 501 U.S. at 729-30. Second, the petitioner may not have presented the claim to the state court, but, pursuant to the state court's procedural rules, a return to state court would be futile in that no state remedies remained available at the time of filing the federal habeas petition. See Harmon v. Ryan, 959 F.2d 1457, 1460 (9th Cir. 1992); McQuown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1986); Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle, 456 U.S. at 125 n.28). In such situations, the petitioner has procedurally defaulted on such claims, and the claims are "technically" exhausted.

Generally, a procedurally defaulted claim will not be considered on a writ of habeas corpus without a finding of "cause and actual prejudice" for the default or a showing that the failure to consider the claims will result in a fundamental miscarriage of justice. See Harris v. Reed, 489 U.S. 255, 262 (1989); Harmon, 959 F.2d at 1461. However, the doctrine of procedural default is based on comity, not jurisdiction, and federal courts may consider the merits of procedurally defaulted claims even without a showing of cause and prejudice where the state procedural bar is not independent of the federal claim or is "inadequate" to warrant the abstention of federal review. See Harmon, 959 F.2d at 1461.

In this matter, Respondent concedes that Petitioner's competency claim has been properly exhausted. Accordingly, the Court may reach the merits of that claim. Petitioner has not, however, properly exhausted all of his ineffective assistance of counsel claims. The only

ineffective assistance of counsel claim that is properly exhausted is the claim that counsel provided ineffective assistance by failing to pursue another Rule 11 examination after the trial court denied the first request. Accordingly, the Court may only consider Petitioner's remaining ineffective assistance of counsel claims if he has demonstrated cause and prejudice.

Despite having ample opportunity to present a cause and prejudice showing, Petitioner's briefs do not address this issue. As a result, the Court will consider only Petitioner's competency claim and his ineffective assistance of counsel claim regarding the Rule 11 competency hearing.

Competency

Petitioner asserts that his due process rights were violated because he was incompetent during plea bargaining and trial. Both of these claims are properly exhausted and before the Court. A defendant may not stand trial if he is incompetent. See Godinez v. Moran, 509 U.S. 389, 396 (1993). "The standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Id. (quoting Dusky v. United States, 362 U.S. 402 (1960)).

State court findings of fact are entitled to a presumption of correctness. See 28 U.S.C. § 2254(d)(8) (stating that state court findings of fact should be accepted if "fairly supported by the record"). See also Rector v. Clark, 923 F.2d 570, 573 (8th Cir. 1991). After reviewing a psychological evaluation prepared for the hearing on Petitioner's Rule 11 motion, the trial court necessarily found that there were not reasonable grounds to believe that Petitioner was incompetent. Prior to reaching its decision the trial court considered a report by clinical psychologist Todd Flynn. Dr. Flynn wrote in his report:

> [Petitioner] does not show any of the emotional or cognitive signs or symptoms of a psychotic-level disorder. There is no

evidence that he suffers from any acute, psychotic-level disorder of the sort that can be found in the DSM-III-R.

Flynn Report, April 16, 1991, p.3.

Dr. Flynn stated that Petitioner's "religious beliefs are extreme and would be considered fanatic by many lay people and professionals." Report, at 5-6. However, Dr. Flynn stated that Petitioner had "an excellent understanding of . . . his specific legal situation." Report, at 4. He stated, "there is no question about Mr. Polston's ability to acquire a rational and factual understanding of the legal procedure which he faces." Id. Furthermore, the trial court expressly stated that Petitioner possessed the "mental capabilities to understand the proceedings." See Defendant's Answer, Ex. C at 4.

After the trial, the trial court held an evidentiary hearing regarding Petitioner's request for post-conviction relief. The core issue of the hearing was to determine Petitioner's competency before and during the trial. The trial court stated that it would grant Petitioner's motion for post-conviction relief if it found him to be incompetent during the trial. Thereafter, the trial court denied the motion for post-conviction relief. Accordingly, the trial court found Petitioner to have been competent. The pre-Rule 11 hearing and the post-conviction relief findings are entitled to a presumption of correctness. See Demosthenes v. Baal, 495 U.S. 731, 734 (1990) ("[A] state court's conclusion regarding a defendant's competency is entitled to such a presumption.")

Petitioner's main argument that he was incompetent flows from his religious activity during the criminal proceedings. Petitioner made decisions by reading his Bible, praying, and fasting. Petitioner refused to accept the plea agreement because he believed that God wanted him to accept whatever consequences God willed.

Petitioner relies on the testimony of Dr. Joseph Geffen to establish his incompetence. Dr. Geffen, after conducting a retroactive competency evaluation of Petitioner two and one-half years after the trial, testified that he believed that Petitioner "probably was

incompetent" immediately prior to, and during, his trial. R.T., March 7, 1994, at 42. He conceded, however, that Petitioner possessed a factual understanding of the proceedings and had never been diagnosed with a mental illness. R.T., at 49. Furthermore, Dr. Geffen conceded that the only evidence of Petitioner's incompetence during the trial was his refusal to accept the plea offer. R.T., at 74.

Dr. Geffen based his opinion that Petitioner was incompetent during and before trial, in part, on his belief that Petitioner heard "voices." The record, however, demonstrates that Petitioner expressly denied hearing God's audible voice. Rather, Petitioner believed God directed him through the Bible and in an internal sense of direction.[2]

Dr. Geffen also based his opinion on Petitioner's refusal to accept a plea offer. This is not incompetence. A defendant is not incompetent because he chooses a course of action that his counsel or the majority of defendants would not choose. In Whitmore v. Arkansas, 495 U.S. 149, 165 (1990), a defendant who had been sentenced to death refused to appeal his capital sentence although counsel had explained to him that he had several grounds for appeal. Id. He believed that it would be "a terrible miscarriage of justice for a person to kill people and not be executed." Id. (citations omitted). Despite the defendant's choice to accept his capital sentence without appealing, the Supreme Court found that he was competent. Id.

A defendant is incompetent if he cannot provide assistance to counsel because he does not understand the nature of the legal proceedings against him. See Godinez, 509 U.S. at 396. After conducting a Rule 11 evaluation of Petitioner, Dr. Flynn stated that "Mr. Polston shows an excellent understanding of the legal system generally and his specific legal situation." Flynn Report, at 4. Furthermore, Dr. Flynn determined that "there is no question about Mr. Polston's ability to acquire a rational and factual understanding of the

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2. Dr. Geffen concedes that Petitioner understood the nature of the proceedings, the role of the attorney, the prosecutor, the judge, the jury, and the questions asked him at trial.

legal procedure which he faces. He is well able to cooperate with counsel in preparing a defense in his case." Id. at 4-5.

Even without a presumption that the trial court was correct, the record indicates that Petitioner was competent at trial and during plea negotiations. A criminal defendant's willingness, motivated by religious conviction, to accept the likelihood of a lengthier sentence is not incompetence. Cf. Whitmore, 495 U.S. at 165.

Ineffective Assistance of Counsel

In order to establish ineffective assistance of counsel, Petitioner must show that (1) his counsel's performance was deficient; and (2) the deficiency prejudiced the Petitioner. See Strickland v. Washington, 466 U.S. 668, 687 (1984); James v. Borg, 24 F.3d 20, 26 (9th Cir.), cert. denied, 513 U.S. 935 (1994). Assertions of ineffective assistance of counsel present mixed questions of fact and law, Strickland, 466 U.S. at 689, but the Court should give deference to state court findings of fact. See 28 U.S.C. § 2254(d).

Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 689-90. "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. To show deficient performance Petitioner must demonstrate that his counsel's representation was "below an objective standard of reasonableness." Id. at 688-89. Furthermore, to establish prejudice, Petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Petitioner asserts that counsel should have renewed his request for a Rule 11 hearing after re[illegible]ving Dr. Flynn's Rule 11 report. Counsel's decision not to renew his request was reasonable. The trial court had already considered Dr. Flynn's report in its decision denying counsel's original request for a competency hearing. Although Petitioner asserts that the trial court misread Dr. Flynn's report, there

is no evidence of that in the record. Rather, the trial court demonstrated familiarity with Dr. Flynn's evaluation and relied on it in making her determination. Therefore, Petitioner's trial counsel acted reasonably by not renewing his request for a competency hearing.

Accordingly,

IT IS HEREBY ORDERED that the petition filed pursuant to 28 U.S.C. § 2254 is **DENIED** and this case is **DISMISSED**.

DATED this 8th day of January, 1999.

JOHN M. ROLL
United States District Judge

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